

On 14 December 2009, an email was received from the Director of the Direct Marketing Commission by 3 of the Business Advertisers who lodged the complaint to the DMC in 2008:

“Dear all,

I will be writing to you all formally to advise you of the DMC’s final adjudication on your complaint against Yell Limited – but I thought you would like to see this as soon as possible electronically.

The DMC have reconsidered their original ruling, following the report of the Independent Appeals Commissioner, John Bridgeman – his report and their conclusions are attached. This represents the final stage of the process. A report of the complaint, appeal and adjudication will now be published on the DMC website.

I am sorry that this has taken such a time to resolve but I hope you will agree that your complaint has been given the most serious and thorough consideration by the Commission and by the Appeals Commissioner. Your patience has been appreciated.

With all good wishes,
Caroline

Caroline Roberts
Director of the Direct Marketing Commission”

**APPEAL BY MS CHRIS RAPLEY AND OTHERS TO THE DMC APPEAL COMMISSIONER
AGAINST THE DIRECT MARKETING COMMISSION DECISION ON COMPLAINT
AGAINST YELL LTD.**

1. Procedure

The complaint by Lichfield advertisers against Yell Ltd in respect of delivery of "Your Town Lichfield" was considered by the Direct Marketing Commission and adjudication made on 4th June 2009.

The adjudication was the subject of an appeal by three of the complainants (Mrs. Christine Rapley, Mr. Howard Jacobs and Mr. Simon Roberts) to the Independent Appeals Commissioner.

The Appeals Commissioner held a meeting on 6th August 2009 with Mrs. Rapley, Messrs. Jacobs and Roberts, and with Mr. Christian Wells of Yell Ltd. on 27th August 2009.

The Appeals Commissioner's advice was received by the Direct Marketing Commission on 30th November 2009.

The Direct Marketing Commission met on 2nd and 7th December 2009 to review the case in the light of this advice, including additional information made available to the Independent Appeals Commissioner during the appeal procedure.

The Commission's final adjudication on the case of "Your Town Lichfield" advertisers -v- Yell Limited is set out below, together with the Appeals Commissioner's Report.

In summary, the Commission decided to uphold breaches of paragraphs 3.17 and 3.21 of the Code of Practice and decided not to uphold a breach of paragraph 3.22 of the Code.

2. Evaluation and Recommendations to the Commission by the Independent Appeals Commissioner in the case of the appeal lodged by Lichfield Advertisers against the Direct Marketing Commission's adjudication on their complaint against Yell Ltd.

"I uphold the appeal in part.

It is my considered view that:

1. In relation to paragraph 13.10 of the Code I was not persuaded that there were "in theory" adequate resources to effect full delivery in a number of "Difficult to Serve" areas
2. In relation to paragraphs 13.15 - 13.17 of the Code I was not persuaded that the terms and conditions of the bargain between Yell and its advertisers were sufficiently clear.
3. There are some doubts over the authenticity of some of the back checking data on which Yell has relied.

4. In relation to paragraph 3.17 of the Code requiring "Full contractual Fulfilment" and on a balance of probabilities I concluded that Yell had failed to complete the contract in terms of the delivery levels quoted to advertisers.

5. The requirement to conclude categorically whether or not there was a failure to complete the contract was an inappropriately strict test for the Direct Marketing Commissioners to apply.

6. Notwithstanding these conclusions I found that Yell's actions in meeting complainants and in agreeing financial settlements with unhappy advertisers was commendable. Furthermore I have found no evidence that Yell's handling of the situation has damaged the public image of direct marketing and the Direct Marketing Association. As a result I could not uphold that there has been a breach of paragraph 3.22 of the Code.

7. There is a clear need to review the Direct Marketing Code and guidance related to door to door delivery. I found it disproportionate for the Direct Marketing Commission to decide that Yell had brought into disrepute a code which was recognised as being inadequate.

8. Insufficient attention has been given to Yell's contention that the DMA Code, generally, does not apply to directories.

9. The Direct Marketing Commission might have formed a different view of the case had the evidence been collected, analysed, presented and considered in a different way.

10. I should err on the side of complainant customers of direct marketing in this case in view of ambiguities of the appeal process and the role of the Independent Appeals Commissioner between the written and the on-line versions of The Direct Marketing Code."

John Bridgeman
Independent Appeals Commissioner.
November 2009

3. DMC's consideration of the Appeal Commissioner's conclusions and recommendations

Conclusion One

"In relation to paragraph 13.10 of the Code I was not persuaded that there were 'in theory' adequate resources to effect full delivery in a number of 'difficult to serve' areas."

On the basis of the evidence presented to the Commissioners, the DMC considered that Yell Ltd had demonstrated that it did have adequate resources and appropriate systems in place to carry out the services it offered and it remains of this view. This conclusion related specifically to the resources available. The related question of whether the contract to deliver was met is addressed separately under paragraph 3.17 of the Code of Practice (see below).

Conclusion Two

"In relation to paragraphs 3.15 – 3.17 of the Code, I was not persuaded that the terms and conditions of the bargain between Yell and its advertisers were sufficiently clear."

The appeal exercise sought out but could not identify further and clearer contractual terms. In light of this the DMC agrees with the finding of the Appeals Commissioner that there was a partial absence of clarity in the terms and conditions offered by Yell Ltd to its advertisers. The DMC has therefore decided to add to its original adjudication so as to uphold a breach of 3.21 of the code which states: "Members must adopt clear terms and conditions of supply, including fair contracts. Contracts with consumers must be drawn up taking into account the Unfair Terms in Consumer Contracts Regulations 1999."

Conclusion Three

"There are some doubts about the authenticity of some of the back checking data on which Yell has relied".

The Appeals Commissioner was given a detailed presentation of the final back-checking data which he believed to be theoretically feasible but improbable in practice. The DMC remains of the view that there was no technical breach of Code paragraph 13.21, because Yell Ltd had met the Code's requirements by providing "*the results from backchecks or alternative forms of quality control*". However, the Commission shares the doubts expressed by the Appeals Commissioner about the value of that data and these doubts are taken into consideration in relation to the DMC's consideration of conclusions four and five (see below).

Conclusions Four and Five

"In relation to paragraph 3.17 of the Code requiring 'Full Contractual Fulfilment' and on a balance of probabilities I concluded that Yell had failed to complete the contract in terms of the delivery levels quoted to advertisers."

"The requirement to conclude categorically whether or not there was a failure to complete the contract was an inappropriately strict test for the Direct Marketing Commissioners to apply."

The DMC notes the Appeals Commissioner's view that it used an inappropriately strict test when considering whether or not it had sufficient proof categorically to conclude that Yell had failed to complete the contract in terms of the delivery levels quoted to advertisers. The wording of the original adjudication on this point may have given this impression and the DMC confirms that the correct test was whether it could conclude this on the balance of probabilities.

The Appeals Commissioner considered additional evidence during his hearing of the advertisers' appeal, which led him to the conclusion that, on the balance of probabilities, Yell had failed to complete the contract. In the light of the Appeals Commissioner's findings, the DMC accepts that, on the balance of probabilities, Yell failed to complete the contract in terms of the delivery levels quoted to advertisers and therefore did not fulfil its contractual obligations to its customers. The DMC therefore revises its original adjudication to uphold a breach of paragraph 3.17.

Conclusion Six

“Notwithstanding these conclusions I found that Yell’s actions in meeting complainants and in agreeing financial settlements with unhappy advertisers was commendable. Furthermore I have found no evidence that Yell’s handling of the situation has damaged the public image of direct marketing and the Direct Marketing Association. As a result, I could not uphold that there has been a breach of paragraph 3.22 of the Code”.

The Commission judged that Yell Ltd’s conduct in resolving this matter was, in some respects, less than satisfactory. However, since reaching that conclusion, the Commission has clarified and published its approach to assessing risk and intent in these cases. Based on these additional tests and the views of the Appeals Commissioner’s conclusion, the DMC has revised its original adjudication so as to not uphold a breach of paragraph 3.22 of the Code. This is a Code clause with scope for wide interpretation. To assist with any future cases, and to help industry understand how it views the provision, the Commission will take further steps to clarify its approach to this requirement.

Conclusion Seven

“There is a clear need to review the Direct Marketing Code and Guidance related to door to door delivery. I found it disproportionate for the Direct Marketing Commission to decide that Yell had brought into disrepute a Code which was regarded as being inadequate.”

It is not within the DMC’s remit to write or revise the DMA’s Code of Practice. The Commission’s role in this instance is to investigate complaints in relation to the Code as it is written. However, the Commission has already communicated its concerns about ambiguities within the relevant sections of the Code to the DMA, and understands that the Code is currently under revision.

Conclusion Eight

“Insufficient attention has been given to Yell’s contention that the DMA Code, generally, does not apply to directories.

The Appeals Commissioner has acknowledged that this issue was not formally raised by Yell until after it had received notice of the DMC’s original adjudication. In any event, the DMC’s view is that Yell’s contention is without any merit. Yell employed a direct marketing channel (door to door delivery) to distribute its directories and, as such, this activity (rather than the product itself) comes within the scope of the Code.

Conclusion Nine

"The Direct Marketing Commission might well have found a different view of this case had the evidence been collected, analysed, presented and considered in a different way."

The Commission agrees this was a complex case but is satisfied that due process was followed throughout the investigation of the complaint. However, in the light of the Appeals Commissioner's comments, the Commission has carefully reconsidered its original findings and has revised its original findings in relation to conclusions 2, 4, 5 and 6.

Conclusion Ten

"I should err on the side of the complainant customers of direct marketing in this case in view of ambiguities of the appeals process and the role of the Independent Appeals Commission between the written and the on-line version of the Direct Marketing Code."

The Commission will ensure that there is greater clarity on the Appeals procedure and has brought this to the DMA's attention. The disparity between the online version of the Code and the relevant passages on the Commission's website will be addressed.

4. Outcome of the Appeal – Revised Adjudication

As a result of the appeal, the DMC has revised its original adjudication on the grounds set out above.

The following breaches are upheld:

- Paragraph 3.17 (full contractual fulfilment)
- Paragraph 3.21 (clear terms and conditions)

The following breaches are not upheld:

- paragraph 3.22 (disrepute)

The adjudication will now be published on the DMC website.

Direct Marketing Commission
14th December 2009